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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 EILEEN MENDEZ,

4 Plaintiff,

5 v.

19 CV 2945 (DAB)

6 NEW YORK CITY DEPARTMENT OF
7 EDUCATION,

8 Defendant.

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9 New York, N.Y.
10 September 12, 2019
10:40 a.m.

11 Before:

12 HON. DEBORAH A. BATTS,

13 District Judge

14 APPEARANCES

15 KARL ASHANTI, ESQ.
16 Attorney for Plaintiff

17 DAVID S. THAYER, ESQ.
18 Attorney for Defendant

J9C6MENC

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record, starting with plaintiffs' counsel.

MR. ASHANTI: Good morning, your Honor. Karl Ashanti from the Brain Injury Rights Group appearing on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Ashanti.

The way we work in this courtroom is remain seated when you talk to me and use the microphone.

MR. ASHANTI: Certainly.

THE COURT: On behalf of the New York City Department of Education, we have Mr. David Thayer.

MR. THAYER: Yes, your Honor. That's correct.

THE COURT: Good morning to both of you.

Now, this is somewhat of a hybrid procedure.

Bear with me for one second.

(Pause)

THE COURT: As I started to say this is somewhat of a hybrid proceeding. The parties by letter suggest that they are at the stage where they wish to make a motion for summary judgment.

Is that correct?

MR. THAYER: Yes, your Honor.

MR. ASHANTI: Yes, your Honor.

THE COURT: So both parties. So you want to make

J9C6MENC

1 cross-motions for summary judgment?

2 MR. ASHANTI: That's correct, your Honor.

3 THE COURT: You have had discovery, or you are
4 limiting it to the administrative record?

5 MR. ASHANTI: It's the administrative record, your
6 Honor. There are no disputed issues of material fact.

7 MR. THAYER: We're planning to moving solely on the
8 record and assume that plaintiffs are doing the same.

9 THE COURT: All right.

10 MR. THAYER: Your Honor, there is one new piece of
11 information that I think perhaps would be best to inform the
12 Court of.

13 As your Honor is aware this is an IDEA appeal and it
14 deals with question of pendency. Meanwhile, at the IHO level
15 the administrative proceeding has continued. And as of
16 August 26th a final findings of fact and decision was issued by
17 the IHO in the underlying proceeding that was averse to the
18 Department of Education.

19 The Department's time to appeal that final decision --
20 it extends 40 days ultimately from the date of that decision,
21 but DOE is required to file a notice of intent to seek review
22 by next Friday. If DOE does seek an appeal or does not seek an
23 appeal of that decision, it seems that that would likely have a
24 significant impact on the viability of this case. I am not in
25 a position today to say whether or not the Department of

J9C6MENC

1 Education intends to take an appeal to the SRO.

2 THE COURT: Fill me in a little bit on the procedural
3 history of this case. It went to an SRO; right?

4 MR. THAYER: That's correct.

5 THE COURT: Was it sent back here? Was it sent to IHO
6 by the SRO?

7 MR. THAYER: No. The IHO initially made a decision
8 favorable to the parents, which that the Department of
9 Education essentially took an interlocutory appeal of to the
10 SRO. The SRO ruled in our favor and then plaintiffs have
11 brought that decision for review in this court. But because
12 that was -- I am paraphrasing here by referring to it as an
13 interlocutory appeal -- in the nature of that appeal the
14 underlying proceedings before the IHO continued to the merits
15 and we received now a decision on the merits of the case at the
16 IHO level.

17 MR. ASHANTI: Your Honor, may I?

18 THE COURT: Please.

19 MR. ASHANTI: So there are differing opinions of the
20 plaintiffs and of the Department regarding the effect of the
21 decision issued on August 26th because it did not concern
22 pendency explicitly. It was the underlying resolution and
23 adjudication of the underlying administrative due process
24 complaint that the plaintiffs had filed.

25 THE COURT: Now that was before me also; right?

J9C6MENC

1 MR. ASHANTI: No, it was not. So that is why it is
2 separate. So that underlying due process complaint gets
3 adjudicated at the administrative level and results in a
4 finding of fact and decision, which is separate and apart from
5 the issue of pendency before your Honor.

6 Financially there are ramifications for the finding of
7 fact and decision that was issue on August 26th, but in terms
8 of the rights of the pendency rights of the students, they have
9 not been resolved via decision. So we have differing opinions
10 as to that. So regardless of whether or not the district takes
11 an appeal, dispositive motion practice will be necessary. So
12 the parties we discussed the differing scenarios of whether the
13 Department takes an appeal or not, and we're in agreement that
14 there will be a necessity of dispositive motion practice in
15 either case. Except the substance of the Department's motion
16 would be different obviously between whether or not -- if it
17 did take an appeal, their motion would be different than if
18 they didn't take an appeal. Either way they will be moving for
19 summary judgment and so would the plaintiffs.

20 The timing might be affected by -- we discussed
21 perhaps informing your Honor through a joint status report on
22 the 25th whether or not the Department is taking an appeal and
23 then setting forth a proposed briefing schedule, having
24 discussed it at that point; but in either case dispositive
25 motion practice will be necessary.

J9C6MENC

1 THE COURT: I had intended to try to clarify some
2 issues for me and since I have you here, I might as well
3 continue to try do that. Let me start first with the City.

4 Mr. Thayer, was there 2018-2019 plan prepared for the
5 plaintiff?

6 MR. THAYER: An IEP, your Honor?

7 THE COURT: Yes.

8 MR. THAYER: There was.

9 THE COURT: When was that prepared?

10 MR. THAYER: I am not sure of the exact date, your
11 Honor, but it was rejected by the parents.

12 THE COURT: Okay. Was this before or after the
13 pendency issue came up?

14 MR. THAYER: Pendency is raised in the due process
15 complaint. So it was -- the pendency issue was raised at the
16 same time that plaintiffs attacked the plan offered by the
17 school district. It was raised in the same document, the due
18 process complaint.

19 THE COURT: Mr. Ashanti, would you tell me why the
20 child plaintiff was moved to the iBrain from iHope?

21 MR. ASHANTI: Yes, your Honor. It is my understanding
22 that the initial iteration of iHope, which came first was --
23 the parents were very happy with. They were happy with the --
24 everything about it -- the educational program, the staff, the
25 administration. However, during the course of the '17-'18

J9C6MENC

1 school year, there were changes that were made -- fundamental
2 changes and the original -- essentially the original founders
3 and some of the administration was ousted. There was a split.
4 The nature of the educational program and what was offered at
5 iHope significantly changed as a result.

6 It was initially, you know, a program that was offered
7 to students with traumatic brain injuries solely to concentrate
8 on their needs and the needs of their families. After the
9 change in iHope, there was an organization called YAI that came
10 in and took over. Although, they kept the iHope name. So now
11 for the '18-'19 school year, and I believe still today, there
12 are students of wide-ranging disabilities in the program. The
13 staff has changed. The original -- the administration has
14 fundamentally changed.

15 So the parents looking at this didn't want to go down
16 that road. So it maintains the same name, but it is a
17 fundamentally different school today for the '18-'19 school
18 today. What happened was because of the split, iBrain was
19 created. IBrain was created in the image of the original iHope
20 and so it gave the parents an opportunity to continue the
21 education of the child in the way that they had originally
22 intended through iBrain.

23 THE COURT: Was the Department of Education made aware
24 of this?

25 MR. ASHANTI: Not formally. I don't believe there is

J9C6MENC

1 any requirement for iHope to have informed -- I could be wrong,
2 but I don't believe there is any requirement to inform--

3 THE COURT: I am talking about the plaintiffs.

4 MR. ASHANTI: They made the Department aware through
5 their -- what is called a 10-day notice. So before the '18-'19
6 school year, they -- which doesn't directly relate to iHope at
7 all actually because it was a reaction to the IEP that the
8 Department created for the student that Mr. Thayer had
9 mentioned. So the parents received the Department's IEP for
10 the student for the '18-'19 school year and found there were
11 fundamental deficiencies in that and then objected through the
12 due process complaint by which they also asked for pendency.

13 The import of all of that really is that just
14 factually from the educational program that was given to the
15 students for the '18-'19 school year was purposely designed to
16 be a replica of the educational program that the student
17 received for the '17-'18 school year.

18 THE COURT: That was in the IEP; is that what you are
19 saying?

20 MR. ASHANTI: Well, the IEP is a different issue. So
21 the IEP is the proceeding concerning whether -- the fundamental
22 issue is whether the Department has offered the students a
23 FAPE, free and public education, through that IEP and the
24 placement that would go associated with that. That is for a
25 public school placement. So that is why it is really separate

J9C6MENC

1 and apart from the issue of pendency because the student was
2 enrolled in a nonpublic school for the '17-'18 school year. So
3 the educational program that the student received was strictly
4 a nonpublic school educational program. In the '18-'19 school
5 year, the student similarly received a nonpublic school
6 educational program that was designed to be a replica of the
7 '17-'18 school year educational program. That is the basis of
8 pendency.

9 The plaintiffs claim that the educational program a
10 student received in the '18-'19 school year is a continuation
11 substantially similar to the educational program the student
12 received in the '17-'18 school year, which does not in any way
13 touch the merits because pendency is resolved separate and
14 apart from the merits of the underlying dispute with the DOE
15 regarding the IEP.

16 THE COURT: I understand that, but the question is in
17 my mind, and this obviously will be resolved in your papers or
18 can be resolved hopefully from the papers that you will file,
19 is had the plaintiff remained at iHope, would there be any
20 issue in terms of continuing her there?

21 MR. ASHANTI: Regarding pendency, your Honor?

22 THE COURT: No. Regarding whether or not the
23 Department of Education would have challenged that having paid
24 for the first year at iHope.

25 MR. THAYER: We would not have had an issue with

J9C6MENC

1 continuing funding for the child at iHope under the pendency
2 rubric. Essentially that goes to the heart of our dispute. We
3 believe that once the parent prevails on the merits with
4 regards to a particular educational placement --

5 THE COURT: Which they did in 2017 and 2018?

6 MR. THAYER: Correct.

7 -- they have secured essentially by operation of law
8 the school district's agreement to that placement. In other
9 words, it has been sort of blessed with the imprimatur of the
10 school district's okay even if it was over their objection
11 originally. There was litigation about it. Once the parent
12 removed the child from that placement to another school at
13 which they had not secured a favorable decision through the
14 typical Burlington Carter process that they can't carry the
15 pendency with them because otherwise then a parent could shop
16 around for private schools all on the public school district's
17 dime without really ever securing a sort of baseline
18 administrative decision okaying that school.

19 MR. ASHANTI: Of course it is plaintiffs' position
20 that the Burlington Carter test is with respect to the merits
21 of any underlying due process complaint filed, which again is
22 separate -- the case law is very clear separate and apart from
23 pendency. So Mr. Thayer is correct it is the heart of the
24 dispute because it's -- from the district's perspective, it
25 should have make no difference really, right.

J9C6MENC

1 THE COURT: Wait. Wait. Wait.

2 What do you mean from the district's perspective it
3 should make no difference?

4 MR. ASHANTI: Because you have funding for an
5 education at one nonpublic school and a claim for funding for
6 education at another nonpublic school. So either way there is
7 public funds being outlaid for an education at a nonpublic
8 school.

9 THE COURT: Isn't there an obligation on the part of
10 the Department of the Education to make sure that the program
11 that that child has is sufficient for them?

12 MR. ASHANTI: Absolutely. That is done by scrutiny of
13 the educational program the student is receiving. Meaning, is
14 this essentially the same -- substantially similarity test. Is
15 it essentially the same as the educational program the student
16 previously received. If it is not, if the plaintiffs in this
17 case or any other case fail that test and if there are
18 fundamental differences between the education the student is
19 receiving currently and the educational the student previously
20 received, then there is no pendency. We fully acknowledge
21 that. However, as I pointed out, your Honor, it was pursuant
22 to the educational program the student received --

23 THE COURT: Slow down.

24 MR. ASHANTI: The educational program the student
25 received for the '18-'19 school year was specifically designed

J9C6MENC

1 to be a replica of the educational program the student had
2 received in the '17-18 school year. So the case law is clear.
3 The Second Circuit's case law is clear that it is an
4 educational program. The substance of the educational program
5 that defines the placement for purposes of pendency. So it is
6 the educational program that is the same, and that is what
7 we're claiming here.

8 It is not a matter of shopping around for schools
9 because if you go to any school if the educational program the
10 student is receiving is different, you don't get pendency.

11 THE COURT: Well, the timing of this is kind of a
12 puzzle to me. I know that the child went to the school 12
13 months a year.

14 MR. ASHANTI: Yes.

15 THE COURT: It was year-around. Under that program
16 doesn't the school year start July 1st?

17 MR. ASHANTI: It starts the 1st --

18 MR. THAYER: In early July.

19 MR. ASHANTI: Yes. It is always early July. Because
20 of the July 4th holiday, typically it will be the first or
21 second week of July.

22 THE COURT: Before seeking the pendency continuation
23 of funds, is there no opportunity for the Department of
24 Education under these circumstances since it is a different
25 school to see that it is substantially similar to the program

J9C6MENC

1 that was paid for in 2017-2018?

2 MR. ASHANTI: Absolutely, your Honor. We provided all
3 that documentation to the Department, but the Department's
4 position is even if they are exactly the same -- the
5 educational program is exactly the same because there is a
6 change of location, you don't get pendency. That is the
7 Department's position.

8 THE COURT: He is shaking his head. Let me hear what
9 his position is and then you can respond.

10 MR. THAYER: The Department's position is that the
11 removal of a child from a sanctioned placement at any school --
12 the removal of a child from that placement constitutes a change
13 in placement and you therefore cannot carry pendency funding.
14 It's not about the -- the Department's position is that we
15 don't even get to substantial similarity in these
16 circumstances. Substantial similarity comes out of school
17 district's necessary to be able to, say, take a child from one
18 school location and put them in another one because of
19 staffing, budgetary constraints. Historically that prompted
20 the Department to be sued by parents who were saying, Keep our
21 kid at that school location, and substantially similarity was
22 developed as a response to give the school district some wiggle
23 room in that area.

24 In those circumstances, the child's placement, the
25 educational program, is being administered within one single

J9C6MENC

1 school district. That is a public school. So they are both --
2 schools in that scenario are public schools. Here, the parents
3 unilaterally took the parent -- took the child out of public
4 school into a private school got -- over the DOE's objection --
5 an okay for that private school and then the next year
6 essentially did that again.

7 So the Department's position is that we don't get to
8 substantial similarity in those circumstances.

9 MR. ASHANTI: Right. Again, it goes back to what I
10 said before. Even if --

11 THE COURT: Slow down. Slow down.

12 MR. ASHANTI: The position is even if it was
13 substantially similar, I understand the Department believes
14 that the Court shouldn't apply the substantial similarity test
15 here; but the point is factually the Department's position is
16 even if it is exactly the same educational program that the
17 student is not entitled to pendency because of the change of
18 location from one school to the other. Again, we're talking
19 about one nonpublic school to another nonpublic school.

20 THE COURT: Is that a distinction in the cases?

21 MR. ASHANTI: It is not a distinction in the cases in
22 terms of the definition of educational placement. The
23 operative term in pendency is the students then current
24 educational placement. So then the issue becomes what does the
25 word placement in that phrase mean, and the courts have defined

J9C6MENC

1 it and the Second Circuit has defined it definitively and there
2 is no other definition that has been promulgated by the Second
3 Circuit. It means the educational program that the student has
4 been given, not the bricks and mortars.

5 THE COURT: I understand that argument, but I guess my
6 question here is: Doesn't that put the Department of Education
7 at a Whack-a-Mole situation? You say it is the same program
8 and you keep moving from one school to the other, location-wise
9 is that something that you understood is the responsibility of
10 the Department of Education?

11 MR. ASHANTI: Well, here is the thing about that, your
12 Honor. In terms of the Department and the application of the
13 Burlington-Carter test, they have that opportunity and that is
14 with the underlying due process complaint. So the Department's
15 objection is, Well, we didn't have the opportunity to
16 scrutinize this school to see if it passes muster. Well, they
17 do. That's the ongoing -- well, actually now it has been
18 resolved in the parents' favor. That is what we are seeing,
19 the underlying proceeding before the IHO, IHO John Farrigo, was
20 that, exactly that. The Department's position was the school,
21 iBrain, is not an appropriate FAPE school location for the
22 student. They lost; we won. So the finding right now, unless
23 they appeal, is iBrain is appropriate for this student. Again,
24 that is merits on the merits.

25 THE COURT: I get that.

J9C6MENC

1 Continue.

2 MR. ASHANTI: So my point there is the Department
3 absolutely has and has had the opportunity to scrutinize and
4 object to anything that they find -- that they found
5 inappropriate with respect to iBrain. They have had that
6 opportunity. It has been going on for the entire school year.
7 It actually concluded through the decision on August 26th,
8 which is technically after the '18-'19 school year. So they
9 have had that opportunity and nothing that the parents have
10 done has foreclosed that opportunity.

11 Pendency on the other hand, though, is whether or not
12 there is -- the status quo as been maintained for the student
13 educationally while that underlying proceeding before the IHO
14 was going on. It is the parents' position and the case law is
15 defined as the educational program, the substantive education
16 until program the student has received. Because it is the
17 same, the student is entitled to pendency and it is simple as
18 that. There are two separate processes with two separate
19 objectives and two separate goals.

20 In terms of the idea moving from place to place to
21 place, that is not our facts. Our facts are very specific. I
22 am glad your Honor asked why the -- there was no transfer or
23 move or change. Because the '18-'19 school -- excuse me, the
24 '17-'18 school year concluded and there was no obligation on
25 the part of the parents to -- you know, the enrollment contract

J9C6MENC

1 that the parents were under concluded at the end of the '17-'18
2 school year. So the '18-'19 school was as a clean break. At
3 the time that -- at the end of the '17-'18 school year, there
4 was no obligation or enrollment contract that required the
5 parents to reenroll the student at iHope. They looked at the
6 situation. They said, Well, this iBrain -- this new school
7 iBrain is essentially the old iHope that we know and love and
8 therefore we are going to enroll our child in the iBrain
9 program, which is essentially the old iHope program.

10 THE COURT: Let me ask you this: How did they know
11 that? When did the iBrain program or school open?

12 MR. ASHANTI: It opened in July of 2018.

13 MR. THAYER: July 19th, 2019.

14 MR. ASHANTI: '18.

15 MR. THAYER: '18 was the first day of school and was
16 the same day that the parents instituted the due process
17 hearing.

18 MR. ASHANTI: Right.

19 MR. THAYER: So in terms of the Department of
20 Education having an opportunity to examine the school, the
21 first day -- when I say "the first day of school," I mean the
22 first day iBrain opened its doors ever and admitted students
23 was July 9, 2019.

24 MR. ASHANTI: '18.

25 MR. THAYER: Thank you. '18. That was the day that

J9C6MENC

1 this proceeding began. I stand by my position that the move
2 severs pendency, but if we're going to talk about the
3 Department of Education having an opportunity to evaluate the
4 sufficiency or for that matter the comparability to iBrain to
5 iHope, there is nothing to look at on July 9th. It was the
6 first day of school ever. As a factual matter, the SRO in this
7 case determined that the schools weren't substantially similar.

8 So I think we have a disagreement about the legal
9 question of whether the pendency can move with the child from
10 iHope to iBrain. And then there is the factual question that
11 is a more traditional IDEA case in that it requires the Court
12 to examine a factual determination by a state administrative
13 decision-maker for deference and so on and so forth.

14 The question of the portability of pendency is --

15 THE COURT: I like that alliteration -- the
16 portability of pendency.

17 MR. THAYER: That is the term that Judge Daniels used
18 in his decision Dupalindo v. the Department of Education.
19 That's why I used it.

20 MR. ASHANTI: So of course with the definition of
21 placement being very clear by the Second Circuit that it means
22 educational program and the educational program is factually
23 being the same sent --

24 THE COURT: But that's based on your assertion. In
25 other words, independently the Department of Education has not

J9C6MENC

1 had an opportunity to look into whether the programs are
2 substantially similar because there was no program on July 8th.

3 MR. ASHANTI: Correct, your Honor. My point is since
4 that time they have had ample opportunity. The pendency issue
5 gets resolved at the beginning of the school year. The whole
6 idea is that it is to be resolved pending the resolution of an
7 underlying due process proceedings. So very early on in the
8 school year we provided all the information that the Department
9 needed before there was any initial pendency decision. All the
10 information the Department needed to say, Okay, well, they are
11 substantially similar. Maybe or even perhaps identical but
12 substantially similar certainly and therefore they could have
13 the ability to not contest pendency at that time. Again, that
14 is separate and apart from their believing that the iBrain is
15 appropriate for the student. That was determined -- that was
16 adjudicated through the underlying due process proceedings.

17 So there was certainly no withholding of information
18 by the parents to the Department of all the documentation or
19 testimony that they would need to make the determination of
20 substantially similarity. They have taken a different position
21 that it is not based upon that, that it is based upon the
22 school location changing and that that severs pendency; but
23 that is not supported by the Second Circuit.

24 MR. THAYER: To the extent that we sort of hashed out
25 the question of substantial similarity at the administrative

J9C6MENC

1 level, we have prevailed before the SRO on that question. That
2 is why I should say this Court should give deference to that
3 factual determination that requires educational expertise. So
4 it is our position that we would prevail on their view of what
5 the law is. Of course we think that the law is a little bit
6 different in fact and so we also believe, though, that we will
7 prevail under our theory that if you port pendency from one
8 place to another, you lose it essentially unless and until you
9 can prevail on a Burlington-Carter analysis with regards to the
10 placement program that is being offered at that school.

11 MR. ASHANTI: Two things about that, your Honor. So
12 the parents have prevailed on the very test that Mr. Thayer
13 mentions, the Burlington Carter test. So now there is no issue
14 factually about whether this program at iBrain is appropriate
15 for the student. It is.

16 MR. THAYER: I--

17 THE COURT: One at a time.

18 MR. ASHANTI: So there's -- that's the situation.
19 They haven't prevailed on the issue of substantial similarity
20 factually because we have appealed. So there is no unappealed
21 decision saying that the educational programs are not
22 substantially similar. That is the whole reason we're here
23 today. We appealed that decision by the SRO, which again is --
24 there is no requirement and certainly that the issue of
25 substantial similarity be adjudicated by either an IHO solely

J9C6MENC

1 or by SRO solely.

2 In fact, Judge McMahon had adjudicated the issue and
3 it has been done previously. Judge Torres has adjudicated that
4 issue as well. Because of the evaluation of the educational --
5 factually the evaluation of the educational programs students
6 have received in the past, specifically the '17-'18 school
7 year, in comparison to the substance of the educational program
8 the students have received in the '18-'19 school year. So that
9 can and should be adjudicated by a court, your Honor. That is
10 the whole purpose of having that protection under the IDEA of
11 being able to appeal to the district court.

12 Certainly that will be resolved in the papers if there
13 is any -- in terms of the law, we have differing opinions as to
14 the law, but I don't think when your Honor -- after your Honor
15 reviews what the Second Circuit has put forth that there will
16 be any dispute as to that. It was an unequivocal definition of
17 what an educational placement means. So the -- really the --
18 in essence the Department's position is that educational
19 placement as defined by the Second Circuit does not mean
20 educational program when it is the plaintiffs that are using
21 the term, which does not make any sense. It is a definition.
22 So the definition of an apple doesn't change if you are at the
23 beach or in a courtroom or at a baseball game. An apple is an
24 apple. The Second Circuit has clearly defined what educational
25 placement means.

J9C6MENC

1 THE COURT: I don't mean to cut you off, Mr. Ashanti,
2 but in terms of the placement issue, has that been determined
3 by the Second Circuit when a transfer from one school to
4 another school has occurred? There is no question in my mind
5 that if they stayed at the same school, this wouldn't be an
6 issue. So the question I am having is is there a Second
7 Circuit case that is addresses when you take the child out of
8 one bricks and mortar and take them to another bricks and
9 mortar if the program is the same, then that bridges pendency?

10 MR. ASHANTI: That's a very good question, your Honor.
11 There are actually three cases that are pending appeal on that
12 issue.

13 MR. THAYER: I think there are four or five. I think
14 we have four or five appeals right now.

15 MR. ASHANTI: From our perspective I think one or two
16 of them are different for varying reasons. The point is there
17 are appeals by both the parents of students of iBrain and the
18 Department that are pending in the Second Circuit.

19 MR. THAYER: I believe the first appeal that is on for
20 argument in October is a case that all three of us are on as a
21 matter of fact. Ms. Uto against New York City Department of
22 Education. That is going on for oral argument in October. I
23 believe there are three additional cases including the
24 appeal -- the interlocutory appeal from this case that will be
25 heard together but that are not consolidated in the Second

J9C6MENC

1 Circuit. Briefing starts in late October for that. Maybe
2 briefing has begun, but the Department's brief is due in late
3 October.

4 With respect to your Honor's question about the
5 educational placement and moving from bricks and mortar to
6 another bricks and mortar, there are cases that talk about
7 substantially similarity or approach those words but don't
8 explicitly use them, but they all deal with just public school
9 district moving a child from one school location to another
10 based on budgetary, staffing.

11 MR. ASHANTI: They find that the application of the
12 substantially similarity test is how you determine whether or
13 not that is a proper transfer. So it is the Department's
14 position that substantially similarity test applies in that
15 context but not here. It is our position that it applies in
16 both.

17 THE COURT: Let me ask you, Mr. Thayer, are you saying
18 it matters who moved the person, the student, for the pendency
19 issue not to be an issue?

20 MR. THAYER: It's not who, your Honor. It is in the
21 cases that I am referring to, the child's placement is a public
22 placement. When the parents who have previously unilaterally
23 removed their child to a private school win on Burlington
24 Carter as I mentioned earlier, that is unilateral placement by
25 operation of law. The Department's position sort of becomes

J9C6MENC

1 the public placement.

2 MR. ASHANTI: That's what has happened here, your
3 Honor.

4 MR. THAYER: It is our position that they have
5 essentially now re-unilaterally moved their child from a public
6 placement to a private placement.

7 THE COURT: This is beginning to sound like how many
8 angels dance on the head of a pin, but since this is actively
9 being considered at least as to the constitutional aspect by
10 the Circuit, because that is not before me and you are only
11 before me in this case for the pendency, I don't need
12 necessarily on that question to wait to see what the circuit
13 does unless one of the cases that is in the Circuit does deal
14 with the application of pendency.

15 MR. THAYER: I think all of them do frankly. They
16 involve the question of whether or not a parent can take
17 pendency with them when they move their child from one private
18 school to another private school.

19 MR. ASHANTI: It's our position is different for
20 varying reasons and that is neither here nor there. In terms
21 of the issue of the adjudication of pendency before your Honor,
22 pendency was intended to be the immediate right. So the
23 immediate procedural right, which is why with pendency comes
24 with what the Second Circuit has called an automatic
25 preliminary injunction. That is the VD v. Amback case, which

J9C6MENC

1 is in the Second Circuit. We're here now on September 12th of
2 2019 concerning an issue of pendency that was originally
3 brought before the administrative level on July 9th, 2018. So
4 of course litigation is not --

5 THE COURT: Speedy.

6 MR. ASHANTI: -- speedy. The point being it is our
7 position that given the nature of the right that is being
8 claimed that this matter should certainly proceed and it is
9 perceived in other matters as well.

10 MR. THAYER: This is coming back to the first thing
11 that I said with regards to this August 26th, 2019 findings of
12 fact and decision, if DOE does not appeal that decision,
13 parents will be retroactively reimbursed for the school year.
14 So they will receive the money at issue in this case
15 retroactively rather than the sort of contemporaneously or
16 prospective payments of pendency, which is why I raised it and
17 suggested that it might --

18 THE COURT: We should wait?

19 MR. THAYER: Precisely.

20 THE COURT: Mr. Ashanti.

21 MR. ASHANTI: Your Honor, the only reason that we are
22 agreeing to wait is so that the issue of whether or not the DOE
23 has -- the appeal has been resolved, which is eight days from
24 now is their deadline to admit that decision and act upon it.

25 In terms of the right to pendency, it has been -- the

J9C6MENC

1 courts have established that pendency is -- the issuance of
2 funding through pendency is not a money judgment. The courts
3 have found that. So that means the right regarding pendency is
4 not just a financial right. It is a statutorily guaranteed
5 right. It is a procedural right that requires vindication
6 whether irregardless of -- regardless of the financial aspect
7 of it. So that's why I say whether or not the Department
8 appeals, the Department would then move forward with
9 dispositive motion practice and so will the plaintiffs.

10 MR. THAYER: We disagree.

11 THE COURT: Well, I am not sure. In terms of the
12 pendency if they don't appeal, then the pendency will start;
13 right?

14 MR. THAYER: For the 2019-2020 school year, yes.

15 THE COURT: Not for this year?

16 MR. THAYER: This school year is the 2019 to 2020
17 school year so, yes, your Honor. The answer is yes. If we do
18 not appeal, then presumably -- I will have to talk to my client
19 at length about this, but it is my impression that the parents
20 would be likely entitled to pendency for this ongoing school
21 year.

22 MR. ASHANTI: So regarding the '19-'20 school year it
23 is the same IHO who presided over the '18-'19 claim and the IHO
24 has recently issued a decision awarding pendency on the basis
25 of substantial similarity of educational program the student is

J9C6MENC

1 currently receiving for '19-'20 school year to the last agreed
2 upon placement.

3 THE COURT: '17-'18.

4 MR. ASHANTI: '17-'18, correct.

5 Because it is decided school year by school year, that
6 is the current status of the '19-'20 but the '18-'19 school
7 year has not been resolved. It is our position that even if
8 the Department does not appeal the FOFD, the FOFD is not a
9 resolution of the issue of pendency. It resolves the financial
10 aspect, but it is not a resolution of whether or not the
11 student was originally entitled to pendency for the '18-'19
12 school year and that that is a right that was violated by the
13 Department through its refusal to award pendency at iBrain.

14 MR. THAYER: I don't -- I disagree. Frankly I don't
15 quite understand. The pendency -- the program that it sounds
16 like the IHO in this case and in this order that Mr. Ashanti
17 has just referenced is drawing comparisons between an
18 unappealed findings of fact and decision and the iBrain
19 placement. So I struggle to see how another finding -- an
20 unappealed findings of fact and decision would not have any
21 bearing on pendency, which is what I take Mr. Ashanti to be
22 saying. In any event, I think we're talking in hypotheticals
23 right here.

24 THE COURT: I think I get what you are saying. When
25 will you be able to send me a joint letter about whether you

J9C6MENC

1 are going to appeal or not? Included in that if you have
2 differing views of what the impact of that is, put it all in
3 the same letter.

4 MR. ASHANTI: Your Honor, I think we've discussed it
5 and I believe we're in agreement that September 25th would be a
6 good date for the parties to be able to provide such a status
7 report to the Court -- a joint status report on that issue, but
8 the import of whatever the Department decides would be best
9 resolved through motion practice because either way the
10 Department would be seeking to -- with summary judgment.
11 Either way the plaintiffs would be seeking summary judgment.
12 So I think it makes more sense, at least the parties have
13 discussed, that in that joint status report there would be two
14 main components. One, to inform the Court as to whether or not
15 the Department has appealed; and two, a proposed briefing
16 schedule that incorporates the fact that the Department has
17 either appealed or not appealed.

18 THE COURT: Wait. I am not sure I understand. I
19 thought I understood it at the beginning, but I believe
20 Mr. Thayer said if the Department does not appeal, then the
21 pendency is, what, retroactive or something?

22 MR. THAYER: The pendency is not retroactive, but they
23 would essentially get tuition reimbursement under the classic
24 IDEA scenario.

25 MR. ASHANTI: Which is not pendency. So financially

J9C6MENC

1 there would be funding to the parent, but it would not be under
2 the rubric of pendency. The issue regarding the rights of the
3 student concerning pendency would not have been resolved.

4 So obviously the Department -- I mean, the parents
5 would be in a more favorable position with an unappealed
6 decision saying that iBrain is an appropriate placement for the
7 student if the Department does not appeal. Again, it is not as
8 though the Department would then acknowledge, well, we were
9 wrong all along.

10 THE COURT: I don't know if that is what the purpose
11 of summary judgment is. If there is no continuing controversy,
12 it is not clear to me. This is an academic question, an exam
13 question. If there is no problem in terms of what the parent
14 is getting, it's not clear to me. What you are seeking is a
15 court definition that private to private transfer unilaterally
16 is the same thing, deserves pendency.

17 Is that an accurate statement?

18 MR. ASHANTI: Yes, your Honor. It is a year-to-year
19 determination. If there is financing, funding but no such
20 determination that would mean that the rights of the student
21 with respect to pendency of the '18-'19 school year were not
22 resolved.

23 THE COURT: Why do they have to be resolved if money
24 gets sent to the parent or the school and going forward that is
25 going to be what happens? Unless they switch schools, brick

J9C6MENC

1 and mortar again.

2 MR. ASHANTI: Well, that wouldn't happen for purposes
3 of the action before your Honor.

4 THE COURT: That is what I am not going to deal with
5 if it is not going to happen.

6 What I am trying to say is that we narrowly deal with
7 an actual controversy before us. What you are saying is that
8 if in the Department of Education does not appeal, we want
9 there to be case law that says no matter where you take the
10 child -- I don't know even if we get to the substantially
11 similar -- if you move the child from one school physically to
12 another school physically that is the same school for purposes
13 or program for purposes of pendency. That's what you want;
14 right?

15 MR. ASHANTI: That is what the plaintiff is seeking,
16 yes.

17 THE COURT: I am saying depending on how this gets
18 resolved, it is not clear to me that there is still a
19 controversy before me that I should be dealing with. Let's get
20 to that later. When you send me the letter, you can make your
21 argument before that.

22 MR. ASHANTI: Fair enough, your Honor.

23 THE COURT: Thank you for your elucidation of the
24 issues before the Court.

25 I am ordering this record on a daily basis. Please

J9C6MENC

1 see Jennifer to fill out the form.

2 I anxiously await the September 25th submission from
3 you.

4 Have a good day.

5 MR. ASHANTI: Thank you, your Honor.

6 MR. THAYER: Thank you, your Honor.

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